UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

AMR MOHSEN and ALY MOHSEN

Defendants.

NO. CR. 03-95-WBS

MEMORANDUM AND ORDER RE: MOTION TO SUPPRESS EVIDENCE SEIZED IN DEFENDANT'S JAIL CELL

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Defendant Amr Mohsen ("Defendant") moves to suppress any and all evidence obtained during execution of a search warrant for defendant's jail cell on June 15, 2004. He bases this motion on his allegations that the search procedure did not adequately prevent the search and/or seizure of documents falling within the attorney-client privilege. He also moves to exclude the contents of his handwritten notes, based on the marital communications privilege, because one of the pages on which the notes are found has defendant's wife's name at the top.

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I. Background

The events of the underlying patent litigation that resulted in perjury and obstruction of justice counts against defendant are well known to the government and defendant. Defendant was indicted in March 2003. The 19-count indictment charged him with one count of conspiracy to obstruct justice and to commit perjury in violation of 18 U.S.C. § 371 (Count 1), four counts of perjury in violation of 18 U.S.C. § 1621 (1) (Counts 2-5), one count of subornation of perjury in violation of 18 U.S.C. § 1622 (Count 10), eight counts of mail fraud in violation of 18 U.S.C. § 1341 (Counts 11-18), and one count of obstruction of justice in violation of 18 U.S.C. § 1503 (Count 19). (March 25, 2003 Indictment). The criminal trial was originally scheduled for March 31, 2004 before Judge Alsup. (Pl.'s Mem. in Opp'n to Def.'s Mot. to Disqualify at 6). On March 27, 2004, defendant was arrested based upon information that he was planning to flee prior to his trial and, on March 29, 2004, Judge Alsup ordered defendant to be detained in the Santa Rita jail pending trial. (Id.).

While detained at the Santa Rita jail, defendant allegedly solicited a fellow inmate's aide in a plot to murder Judge Alsup. (Def.'s Mem. in Supp. of Mot. to Suppress Ex. B (Application & Aff. for a Search Warrant) ¶ 18). The inmate disclosed the murder plot to the F.B.I., (id. ex. B ¶ 19) 19), agents of which, in turn, obtained a search warrant for Amr Mohsen's jail cell. The search was conducted by F.B.I. Special Agents Joseph Montoya and Charles John Gunther and took place on or about June 15, 2004. (Montoya Decl. ¶¶ 1, 2). Montoya and

Gunther discovered a number of items for which seizure was authorized by the warrant. The agents collected and seized all of these materials. (Id. ¶ 3).[1] Included in the material seized were some handwritten notes, attached as Exhibit 3 to the government's opposition to the present motion. The copies of the notes provided to the court are faulty because the tops of the notes failed to copy. (See Pl.'s Mem. in Opp'n to Def.'s Mot. to Suppress Ex. 3 (handwritten notes)). The government concedes that one of the pages had defendant's wife's name, Mervat, at the top. Defendant argues that these notes were intended to be conveyed to his wife.

Special Agent Gunther delivered all of the seized materials to Assistant United States Attorney Ben Burch. (Montoya Decl. ¶ 3; Gunther Decl. ¶ 3). The application and affidavit for this search provided that

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[1] According to an F.B.I. form filed by Agents Montoya and Gunther the day after the search,

> The following items of evidence were seized:
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> 1. Book entitled "Sybil"
> 2. Documents referring to "Kemo" and mental disorders.
> 3. Writings referring to Psychological Disorders and medications.
> 4. Book entitled "DSM-IV".
> 5. Book entitled "A Beautiful Mind".
> 6. Book entitled "I Can See Tomorrow".
> 7. Handwritten notes (21 pages), page 1 addressed to Mervat.
> 8. Document with Arabic writing, and two papers with "KEMO" "408-428-0388".
> 9. Document pertaining to Insanity Trial.
> 10. Documents in Arabic, and Documents referring to Harm, and medication.
> 11. Documents referring to medication and mental illness; envelope with medication.
> 12. Five envelopes with various medications hidden in a book.

(Montoya Decl. Ex. 1 (June 16, 2004 Post-search form)).

> [i]n order to protect Mohsen's attorney-client privilege, this search will be executed by FBI Special Agents and an experienced Assistant United States Attorney ('AUSA'), Charles Ben Burch, who is one of the Professional Responsibility Officer [sic] for the United States Attorney's Office, all of whom will not be further involved in the prosecution of Mohsen's criminal case.

(Def.'s Mem. in Supp. of Mot. to Suppress Ex. B (Application & Aff. for Search Warrant) ¶ 25). The government asserts that this procedure was followed; neither Special Agents Montoya and Gunther nor AUSA Burch are assigned to prosecute, or to assist in prosecuting, defendant. (Pl.'s Mem. in Opp'n to Mot. to Suppress at 3-4; Montoya Decl. ¶¶ 4-6; Gunther Decl. ¶¶ 4-6). Since the time of the search, "the government (1) has provided copies of jail cell materials in the prosecution team's possession to the defense and (2) has made all seized materials available for review by the defense." (Pl.'s Mem. in Opp'n to Mot. to Suppress at 4). Former AUSA (now Judge) Burch declares that the procedure was followed: he screened the written documents seized for those that, in his estimation, were privileged. (Burch Decl. ¶ 3). Of the 21 pages of handwritten notes, three of those pages were withheld by Burch from the prosecuting attorneys. (Id. at ¶ 4).[2]

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[2] Defendant was given an opportunity to respond to the contents of the Burch declaration. He argues that Burch's statement that he reviewed "various items seized during the search" means that he did not review all items before disclosing them to the prosecuting team. (See Burch Decl. ¶ 3).

This argument is more semantic than substantive. In a memorandum authored by Burch and dated September 23, 2004, Burch states that "[o]n a previous date, I looked through all of the exhibits found in defendant Mohsen's cell pursuant to execution of a search warrant." (Burch Decl. Attach.) (emphasis added). Further, Burch states in his September 22, 2005 declaration that his understanding at the time of application for the search warrant was that he "would serve as a de facto 'taint team' to examine any seized items to make sure that they did not contain any privileged attorney-client communications." (Id. ¶ 2)

Defendant does not offer evidence to show that the procedure outlined in the application for the warrant was not followed. Instead, defendant argues that "[t]his procedure . . . was inadequate to safeguard confidential materials in Dr. Mohsen's jail cell that are protected by the attorney-client privilege and work product doctrine." (Def.'s Mem. in Supp. of Mot. to Suppress at 6).

On July 27, 2004, the grand jury issued a superseding indictment charging Amr Mohsen with contempt of court in violation of 18 U.S.C. § 401(3) (Count 20), attempted witness tampering in violation of 18 U.S.C. § 1512(b)(1) (Count 21), solicitation to commit arson in violation of 18 U.S.C. § 373 (Count 22), and solicitation to commit the murder of a federal judge in violation of 28 U.S.C. § 373 (Count 23).

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(emphasis added).

The Burch declaration is sufficient for the court to determine that Burch reviewed all documents taken from Mohsen's cell for possible privilege issues before turning those documents over to the prosecution team. Defendant, in his response to Burch's declaration, "renews his request that the Court order the government to provide declarations from the case agent, assigned prosecutors, and anyone else with substantive involvement on the case sufficient to show what materials were shown to the prosecution team." (Def.'s Response to Burch Decl. at 3). However, since the clear implication of Burch's declaration is that not even a colorable argument could be made that any documents or other items seized from defendant's cell were privileged except for the 21 handwritten pages, and since those 21 pages were carefully reviewed by Burch before he released 18 of them to the prosecution team, and since defendant has presented no evidence that any other privileged documents were turned over to the prosecution team, any order by the court requiring additional declarations would be redundant.

II. Discussion

The court considers defendant's motion to suppress under the Fourth, Fifth, and Sixth Amendments.

A. The Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. "The applicability of the Fourth Amendment turns on whether the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." Hudson v. Palmer, 468 U.S. 517, 525 (1984) (quotation marks and citation omitted). Society must be prepared to recognize this expectation of privacy as reasonable for the Fourth Amendment to apply. Id.

The Supreme Court in Hudson found that society is not prepared to recognize an inmate's expectation of privacy in his jail cell. Id. at 525-26 ("[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."). Defendant distinguishes Hudson by noting that the prisoner in that case had already been convicted at the time of the search, whereas defendant has not been convicted. See id. at 519. However, the concurrence by Justice O'Connor and subsequent case law confirms that this distinction makes no difference in the analysis. See id. at 538 (O'Connor, J., concurring) ("The fact of arrest and incarceration abates all

legitimate Fourth Amendment privacy and possessory interest in personal effects.") (citing Lanza v. New York, 370 U.S. 139, 143 (1962) and United States v. Robinson, 414 U.S. 218, 237-38 (1973) (Powell, J., concurring)); United States v. Van Poyck, 77 F.3d 285, 287, 290-91 (9th Cir. 1996)(reasoning that, because a pretrial detainee has no constitutionally protected reasonable expectation of privacy in phone calls made from jail, "the Fourth Amendment is therefore not triggered by the routine taping of such calls"). Therefore, the fruits of the June 15, 2004 search will not be suppressed on Fourth Amendment grounds.

B. The Fifth and Sixth Amendments

"[G]overnment interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth Amendment right to counsel and his Fifth Amendment right to due process of law." United States v. Irwin, 612 F.2d 1182, 1185 (9th Cir. 1980). "The Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government." Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977).

In Weatherford, plaintiff Bursey filed suit under 42 U.S.C. § 1983 against undercover law enforcement agent Jack Weatherford and Weatherford's superior. Id. at 547. Plaintiff Bursey and Agent Weatherford vandalized together an office of the selective service. Id. Both were arrested. Id. Bursey and Bursey's attorney, not knowing that Weatherford was an undercover

agent, invited Weatherford to two meetings. Id. at 547-48. "At no time did Weatherford discuss with or pass on to his superiors or to the prosecuting attorney or any of the attorney's staff . . . 'any details or information regarding the plaintiff's trial plans, strategy, or anything having to do with the criminal action pending against plaintiff.'" Id. at 548 (quoting the findings of the district court). Although Weatherford testified against Bursey at Bursey's criminal trial, he did not testify as to the content of his meetings with Bursey and Bursey's attorney that took place after Bursey was charged. Id. at 549. Nevertheless, plaintiff Bursey argued for a per se rule holding that any intrusion by the government into the attorney-client relationship was unconstitutional. Id. at 555-56. The Court rejected Bursey's suggested approach, refusing to "assume not only that an informant communicates what he learns from an encounter with the defendant and his counsel but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case." Id. at 557. "There being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment . . ." Id. at 558.

In Irwin, the defendant was arrested because of his attempt to sell cocaine to undercover Drug Enforcement Administration agent Darrell Wisdom. 612 F.2d at 1184. After Irwin's arrest, "Wisdom and Irwin engaged in several telephone conversations" with each other without the consent of Irwin's counsel. Id. During those conversations, Irwin made

incriminating statements. Id. at 1187. Irwin argued that his Fifth and Sixth Amendment rights had been violated. Id. at 1185. The Ninth Circuit did not accept the defendant's argument. "[M]ere government intrusion into the attorney-client relationship, although not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel." Id. at 1186-87. Applying Weatherford, the court found that, because the incriminating statements were not offered at trial, there was no merit in Irwin's contention that he was prejudiced by the incriminating statements. Id. at 1187-88.

Thus, the rule as announced by Irwin is that the defendant must show actual prejudice to show a violation of the Sixth Amendment right to counsel.

> [T]he right is only violated when the intrusion [into the attorney-client relationship] substantially prejudices the defendant. Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.

Id. at 1187 (emphasis added).[3] A criminal defendant must also show actual prejudice to demonstrate a violation of his Fifth Amendment right to due process. United States v. Olano, 62 F.3d 1180, 1190 (9th Cir. 1995).

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[3] Where the government intrudes into the attorney-client relationship such that there has been a violation of the Sixth Amendment, the remedy should be tailored to the injury suffered. United States v. Morrison, 449 U.S. 361, 364 (1981). "[T]he remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongly admitted and the defendant convicted." Id. at 365.

In this case, defendant Mohsen has not shown actual prejudice from any invasion of the attorney-client privilege. Defendant has not identified any document seized that was privileged under the attorney-client privilege. Nor has he shown that any such document was searched and its contents relayed to those responsible for prosecuting him. The evidence, in fact, is to the contrary. Defendant's memorandum in support of his motion is also devoid of any specific reference to actual prejudice he has suffered due to any invasion into his relationship with his counsel. Therefore, defendant's motion to exclude all the fruits of search is properly denied.

However, should the government attempt to introduce material covered by the attorney-client privilege at trial, whether the government discovered that privileged material in the search of the jail cell or otherwise, this memorandum and order in no way acts to prevent defendant from moving for the exclusion of that material. See United States v. Haynes, 216 F.3d 789, 797 (9th Cir. 2000)("[S]uppression of tainted evidence at trial was an appropriate remedy sufficient to cure any prejudice [to the defendants] resulting from an intrusion on their attorney-client relationship.").

The conclusion of the court is in accord with the conclusion reached by the Fifth Circuit in United States v. Limon-Casas, a case that presented similar facts. See 96 F.3d 779 (5th Cir. 1996). In that case, the defendant was arrested on suspicion of directing drug trafficking. Id. at 780. While the defendant was in jail after being represented by counsel at his preliminary hearing and three detention hearings, a confidential

informant told D.E.A. agent Bussey that the defendant recently hired an individual to murder and burn the property of a cooperating government witness. Id. at 781. The day after the informant contacted law enforcement, the defendant's jail cell was taped shut and he was moved to another cell. Id. Before the cell was searched, the defendant moved for a post-seizure examination of any written materials by the court in camera. Id. D.E.A. agent Bussey proceeded to seek a warrant for the defendant's cell to search for photographs of the properties the defendant allegedly intended to burn. Id. at 781-82. That agent did not know of the defendant's pending motion. Id. at 781. An Assistant United States Attorney told Bussey that, when Bussey was directing the search, Bussey was "not to examine attorney-client materials and to isolate any materials with an attorney's letterhead. He [the AUSA] also instructed Bussy that in executing the warrant he should not use any persons involved in the drug case." Id. at 782. The warrant issued and the search was conducted. Id. The agents seized photographs and a letter written to the person the agents originally thought to be the intended victim of the murder but who later turned out to be the defendant's common-law wife. Id. There was no evidence that any communication between attorney and client was disclosed by the search. Id.

The district court in Limon-Casas then heard the defendant's motion. Id. "The district court was concerned from the start of the hearing about an interception of privileged communications between [Limon's counsel] and Limon or possible 'work product.'" Id. The district court found that the

government's actions "compromise[d] the Defendant's Sixth Amendment right to a fair trial and his Fifth Amendment right to be free from self-incriminaton" and dismissed the indictment against the defendant. Id. at 782-83. The Fifth Circuit reversed, finding that there was no evidence of any privileged materials that were searched or seized. Id. at 782-83. "[W]e have found no basis for concluding that the government engaged in any conduct that was illegal and prejudicial to the rights of Limon, the defendant." Id. at 783 (emphasis added).[4]

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[4] Two unpublished cases from other circuits with facts strikingly similar to those in the present case provide persuasive support for the court's conclusion. Both the Sixth and the Tenth Circuits permit the court to cite unpublished cases in circumstances where no other published case would serve as well. U.S. Ct. of App. 6th Cir. Rule 28; U.S. Ct. of App. 10th Cir. Rule 36.3.

In United States v. Robinson, Nos. 94-1538, 94-1727, 1996 WL 506498 at *2 (6th Cir. Sept. 5, 1996), the F.B.I. obtained a search warrant to go through the papers in pretrial detainee West's jail cell. The government was looking for evidence of threats West had made. Id. The government, during the search, "studiously avoided all privileged documents–including all papers with her attorney's letterhead." Id. West argued that the government had invaded documents subject to the attorney-client privilege. Id. at *11. The court rejected West's argument, noting that the F.B.I. official testified that no privileged documents had been touched, and "even if there had been an intrusion into privileged materials, West was unable to show any resulting prejudice." Id. "West's Sixth Amendment arguments are predicated upon mere supposition as to the types of documents the F.B.I. agents might have seen." Id. That mere supposition was insufficient to demonstrate prejudice to the defendant such that defendant's Sixth Amendment rights had been violated. Id.

In United States v. Singleton, No. 02-2142, 2002 WL 31716636 at *2 (10th Cir. Dec. 4, 2002), the Tenth Circuit applied a Sixth Amendment standard considerably more friendly to defendants than the "substantial prejudice" standard announced by the Ninth Circuit in Irwin. "'[W]hen the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed.'" Id. (quoting Shillinger v. Haworth, 70 F.3d 1132, 1134 (10th Cir. 1995).

C. The Marital Communications Privilege

"[T]he 'marital communications' privilege provides that communications between the spouses, privately made, are generally assumed to be confidential, and hence they are privileged." United States v. Montgomery, 384 F.3d 1050, 1056 (9th Cir. 2004)(some punctuation marks and citation omitted). The privilege may be asserted by either spouse. Id. at 1058-59. "The privilege (1) extends to words and acts intended to be a communication; (2) requires a valid marriage; and (3) applies only to confidential communications, i.e. those not made in the presence of, or likely to be overheard by, third parties." Id. at 1056 (citations omitted). The government argues that defendant has not met the requirements of the first nor the third part of the Montgomery test. The government notes, and defendant does not dispute, that the communication, in whatever form it was to take,[5] did not occur, and that defendant cites no case in which the naked intent to communicate was enough to invoke the

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Singleton, a pretrial detainee, alleged that the government seized all of his papers from his cell. Id. As in the present case, the trial team in Singleton was shielded from access to any privileged information obtained by the search. See id. The court approved of that procedure:

> [E]ven assuming that the government intruded into Mr. Singleton's attorney-client relationship without legitimate justification, thereby giving rise to a per se Sixth Amendment violation, the appropriate remedy was provided by the use of a separate government team to review the documents and the special master's hearing to assure that the trial prosecution team had been shielded from any privileged information seized.

Id. at *3.

[5] Defendant has presented no evidence whatsoever as to the means by which he intended to deliver this message, or even whether he intended to deliver it.

privilege. The government further argues that defendant had no reasonable belief in the confidentiality of the notes.

Unlike the attorney-client privilege, the marital communications privilege does not have constitutional underpinnings. United States v. Lefkowitz, 618 F.2d 1313, 1319 (9th Cir. 1980). Moreover, the Seventh Circuit has held that a conversation between a pretrial detainee and his wife does not qualify for the marital communications privilege. United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998).

> [B]ecause the marital communications privilege protects only communications made in confidence, under the unusual circumstances where the spouse seeking to invoke the communications privilege knows that the other spouse is incarcerated, and bearing in mind the well-known need for correctional institutions to monitor inmate conversations, we agree with the district court that any privilege [spouses] might ordinarily have enjoyed did not apply.

Id. (citations omitted).

Similarly, in this case, defendant had no reasonable expectation of privacy in the jail cell where the handwritten notes were found. Hudson, 468 U.S. at 525-26. Defendant has presented no evidence of sealing the notes or even his intent to deliver the notes at a later time. The notes, as far as the evidence shows, were to remain in the cell indefinitely. To hold that papers obtained during a lawful search of the cell for written plans to commit crimes must be suppressed merely because one of those papers has defendant's wife's name at the top would be an expansion of the marital communications privilege akin to constitutionalizing it. (See Def.'s Mem. in Supp. of Mot. to Suppress Ex. B (Application & Aff. for a Search Warrant), Attachment A ¶ 1 (items to be seized included "[a]ny and all

notes, papers, documents and other written materials referring to threatening, harming or committing an arson, murder, or any other act of violence").

In light of the Ninth Circuit's explicit holdings that the marital communications privilege is not grounded in the Constitution, Lefkowitz, 618 F.2d at 1319, and that the marital communications privilege is to be construed narrowly, the court finds it inapplicable in these circumstances. See Montgomery, 384 F.2d at 1056 ("Recognizing that the [marital communications] privilege obstructs the truth-seeking process, we have construed it narrowly, particularly in criminal proceedings, because of society's strong interest in the administration of justice.").[6]

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[6] Even if it were determined that a pretrial detainee could invoke the marital communications privilege as to documents found in his jail cell and not communicated to his spouse, there is another reason to find the privilege does not apply. The notes refer to defendant's fraudulent scheme to set up an insanity defense. (See Pl.'s Mem. in Opp'n to Def.'s Mot. to Suppress Ex. 3 (handwritten notes) ("What is needed in Egypt is to find some phsychologist [sic] (not phsychiatrist/MD [sic]) who can say that I have been under therapy in Egypt for personality disorder / phsychosis [sic] with symptoms of (I) Blackout of events or days of activities that are painful or causing high degree of stress (ii) Imagination or delusions of events that did not happen (iii) Loosing [sic] touch with reality during periods."); id. Ex. 3 ("When asked, Mervat, you can say you I [sic] was taking some therapy in Egypt I kept it confidential. I did not want it to affect my medical record in US. You know little about it."). The marital communications privilege does not apply to communications having to do with present or future crimes in which both spouses are participants. United States v. Marashi, 913 F.2d 724, 730 (9th Cir. 1990).

IT IS THEREFORE ORDERED that defendant's motion to exclude all fruits of the June 15, 2004 search of his jail cell be, and the same hereby is, DENIED;

IT IS FURTHER ORDERED that defendant's motion in limine to exclude the pages of handwritten notes discovered in the jail cell be, and the same hereby is, DENIED.

DATED: October 3, 2005

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE